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U.S. Department of Justice

Immigration and Naturalization Service

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

File: [redacted] Office: VERMONT SERVICE CENTER Date: FEB 06 2003

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(1)(C)

IN BEHALF OF PETITIONER:

[redacted]

PUBLIC COPY

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

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DISCUSSION: The immigrant visa petition was approved by the Director, Vermont Service Center. On further review of the record, the director determined that the petitioner was not eligible for the benefit sought. Accordingly, the director properly served the petitioner with notice of intent to revoke the approval of the preference visa petition, and his reasons therefore, and ultimately revoked the approval of the petition on April 19, 2001. The matter is now before the Associate Commissioner for Examinations on appeal. The case will be remanded for further consideration.

The regulation at 8 C.F.R. 205.2(d) indicates that revocations of approvals must be appealed within 15 days after the service of the notice of revocation. The record indicates that the notice of revocation was mailed on April 19, 2001. The appeal was filed on May 21, 2001, 32 days after the decision was mailed. Thus, the appeal was not timely filed.

It is noted that the director erroneously allowed the petitioner 30 days to file the appeal (33 days if the notice was delivered by mail). The director's error does not, and cannot, supersede the regulation regarding the time allotted to appeal a revocation.

The regulation at 8 C.F.R. 103.3(a)(2)(v)(B)(2) states that, if an untimely appeal meets the requirements of a motion to reopen as described in 8 C.F.R. 103.5(a)(2), the appeal must be treated as a motion, and a decision must be made on the merits of the case.

For the record, subsequent to the filing of this appeal, counsel for the petitioner filed a second petition (EAC 01 251 52267) on behalf of the beneficiary that was approved by the director on January 28, 2002. The director is reminded that all subsequently filed petitions should be held in abeyance while an appeal is pending on the same or similar matters. The director should review the subsequently approved petition and determine whether the facts submitted in support of the petition should have resulted in said approval.

Although the petition will be remanded, examination of the record reveals a number of issues that must be addressed at this time.

Regarding the immigrant classification of an alien worker as a multinational executive or manager, Section 203(b)(1)(C) of the Act states:

> Certain multinational executives and managers. An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and the alien seeks to enter the United States in order to continue

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to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

Review of the record discloses that the beneficiary of this petition was initially approved as a multinational executive, namely the president of the petitioner.

The director served the petitioner by mail with a notice of intent to revoke on April 19, 2001. The grounds for the notice of intent to revoke were based on a finding that the petitioner had not established that the beneficiary had been or would be employed in a primarily managerial or executive capacity.

On September 29, 2000, counsel for the petitioner submitted a rebuttal to the notice of intent to revoke, including the petitioner's Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return for 1998 and 1999, IRS Form 941, Employer's Quarterly Federal Tax Return for 1999 and 2000, petitioner's statement in response to the notice of intent to revoke, as well as other exhibits. Counsel for the petitioner asserted that the petitioner had increased significantly in size since the approval of the petition and that the Service had not shown good and sufficient cause to revoke the petition.

The director examined the evidence submitted in rebuttal and found that the petitioner failed to establish that the beneficiary had been and would be engaged primarily in managerial or executive duties. The director also stated that he was not persuaded that the petitioner could support an executive or managerial position. The director further noted that the beneficiary's eligibility must be established as the date of filing and continuing through the visa issuance. The director concluded that the facts presented indicated that the petition was still not approvable. The director revoked the approval of the petition on April 19, 2001.

On appeal, counsel for the petitioner contends that:

1. The Service has inappropriately re-adjudicated the executive and managerial issues in the absence of gross error,
2. The Service has inappropriately emphasized the size of the petitioner,
3. The Service has inappropriately focussed on the inadequacy of the petitioner's description of the position in the organization,
4. The Service inappropriately denigrates the value of evidence of the company's growth, and
5. The Service has not met its burden of proof of "good and substantial cause" in revoking the petition.

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Counsel's assertion that the Service improperly re-adjudicated the executive and managerial issue in the absence of gross error is not persuasive. The director's decision does not indicate whether he reviewed the prior approvals of the other non-immigrant petitions. The record does indicate that the director had legitimate concerns regarding the beneficiary's position description and the petitioner's number of employees and whether the beneficiary would actually be performing managerial or executive duties in regards to the duties described or would actually be performing the duties. We also noted that if the previous nonimmigrant petitions were approved based on the same general position descriptions that are contained in this record, the approval would constitute clear and gross error on the part of the Service. The Service is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals which may have been erroneous. See, e.g., Matter of Church Scientology International, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that the Service or any agency must treat acknowledged errors as binding precedent. Sussex Engg. Ltd. v. Montgomery 825 F.2d 1084, 1090 (6th Cir. 1987); *cert denied*, 485 U.S. 1008 (1988).

Counsel's assertion that the Service inappropriately emphasized the size of the petitioner is injudicious. The director may consider the size of the organization but in so doing must also take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. In the case at hand, the director specifically pointed out that a review of the record revealed that the majority of the petitioner's employees possessed managerial or executive titles and were employed on a part-time or minimum wage basis. Although the director noted the petitioner's employees at the time of the rebuttal in the revocation, the director correctly questioned whether the reasonable needs of the petitioner could be met by employing a president, vice-president, customer service manager, import and export manager and only four sales and inventory staff. The director's determination that the petitioner had not established that it required a full-time, managerial and executive staff but in light of its sales, also needed a number of individuals to perform the mundane tasks of the enterprise, does take into account the reasonable needs of the petitioner. The director's further determination that the beneficiary would be contributing significantly to the performance of the operational duties is confirmed by the petitioner's own position descriptions.

Counsel's assertion that the Service improperly focussed on the petitioner's position descriptions of its employees is without merit. In examining the executive or managerial capacity of the beneficiary, the service will look first to the petitioner's description of the job duties. See 8 C.F.R. 204.5(j)(5). The initial petition and the response to the request for evidence both provided only general statements regarding the beneficiary's duties and responsibilities. The petitioner's rebuttal to the

director's notice of intent to revoke still did not clearly demonstrate that the beneficiary was primarily performing executive duties in his work for the petitioner. For example, the petitioner states that the beneficiary spends approximately eight hours a week meeting with major customers and eight to ten hours a week traveling and meeting with important customers outside the office. The beneficiary is thus spending approximately sixteen to eighteen hours a week meeting with customers. The petitioner does not explain how this duty is primarily an executive function rather than the beneficiary performing the necessary sales function of the petitioner to gain sales. In addition, the beneficiary spends time signing vendor agreements and the payroll, as well as meeting with "managers," and visiting the warehouse. From the description provided it is not possible to determine if the beneficiary is simply supervising employees, as essentially a first-line supervisor, and continuing to perform sales and financial functions of the petitioner or is providing executive duties relating to these activities. The Service cannot determine from these overly broad descriptions whether twenty-four to twenty-six hours of the beneficiary's workweek is spent performing an executive duty in relation to these functions or whether the beneficiary is performing these functions.

Counsel's assertion that the Service does not properly take into account the petitioner's growth from the filing date of the petition to the date of the revocation is also without merit. A petitioner must establish eligibility at the time filing; a petition cannot be approved at a future date after the beneficiary becomes eligible under a new set of facts. Matter of Katigbak, 14 I&N Dec. 45,49 (Comm. 1971). In addition, 8 C.F.R. 103.2(b)(12) states, in pertinent part: "An application or petition shall be denied where evidence submitted in response to a request for initial evidence does not establish filing eligibility at the time the application or petition was filed." At the time of the response to the request for additional evidence, the petitioner still employed eight individuals and the petitioner had not adequately explained how the petitioner could function with four "executive/managers" and only four individuals performing all the necessary everyday operations of the petitioner. The petitioner had not provided a sufficiently comprehensive position description that would allow a finding that the beneficiary was eligible for this visa classification at the time the petition was filed.

Counsel's assertion that the Service had not met the "good and sufficient cause" standard at the time of the director's decision to revoke is not persuasive. As noted above, the director did raise sufficient factual issues to support the revocation. A notice of intent to revoke approval of a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure t o meet his burden of proof. Matter of Li 20 I&N Dec. 700, 701 (BIA 1993); Matter of Arias, at 569-70;

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Matter of Estime, 19 I&N Dec. 450 (BIA 1987). In the present case the director did raise sufficient factual issues to support the revocation. The decision to revoke will be sustained where the evidence on record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intent to revoke, would warrant such denial. Matter of Ho, 19 I&N Dec. 582 (BIA 1988). The notice of intent to revoke and the subsequent revocation were based on evidence that was on the record at the time the notices were issued. The petitioner did not satisfactorily overcome the factual deficiencies.

ORDER: The petition is remanded to the director for further action in accordance with the foregoing.